IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 6TH JUNE 2007 / 16TH JYAISHTA 1929

SA.No. 429 of 1993(A)

AS.48/1985 of SUB COURT, TIRUR
OS.464/1974 of M.C.,PARAPPANANGADI
.....

APPELLANTS: (PLAINTIFFS/APPELLANTS IN THE COURTS BELOW):
----

1. **APPUKUTTAN ALIAS SANKARANARAAYANAN NAIR, SON OF CHOOLA POOVATHINGAL NANI ALIAS NARAYANI AMMA, KOTTAKKAL AMSOM AND DESOM, ERNAD TALUK, MALAPPURAM DISTRICT.**

2. **MADHAVIKUTTY AMMA, D/O.CHOOLA POOVATHINGAL NANI ALIAS NARAYANI AMMA, ...DO.....DO.....**

3. **SANKUNNI NAIR, S/O.....DO....DO.....**

4. **SAROJINI AMMA, D/O. .....DO...DO.....**

5. **GOVINDANKUTTY NAIR, S/O. ...DO...DO....**

6. **UNNIKRISHNAN NAIR, S/O....DO...DO.....**

BY ADV. SRI.K.RAMACHANDRAN

RESPONDENTS: (DEFENDANTS 1 TO 5 AND 7 TO 16 IN THE TRIAL COURT/
---------- **RESPONDENTS 1 TO 5 AND 7 TO 16 IN THE LOWER APPELLATE COURT)**

1. *** KUTTAN NAIR, SON OF MEENAKSHI AMMA,, THOTTARA VELUTHEDATH, CLARI AMSOM AND DESOM, TIRUR TALUK, MALAPPURAM DISTRICT – D E L E T E D.**

...2/-

2. SANKARAN NAIR, SON OF MEENAKSHI AMMA, THOTTARA VELUTHEDATH, COIMBATORE, TAMIL NADU.

3. KUTTINARAYANAN NAIR, SON OF MEENAKSHI AMMA, THOTTARA VELUTHEDATH, COCHIN, ERNAKULAM.

4. MALU AMMA, D/O.MEENAKSHI AMMA, THOTTARA AVELUTHEDATH, CLARI AMSOM AND DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.

5. LAKSHMIKUTTY AMMA, D/O.MEENAKSHI AMMA, THOTTARA VELUTHEDATH, KOTTAKKAL AMSOM AND DESOM, ERNAD TALUK, MALAPPURAM DISTRICT.

6. AMMUNI AMMA, D/O.KUNHIKUTTY AMMA, THOTTARA VELUTHEDATH, AMBALAPPARA, OTTAPALAM TALUK, PALGHAT DISTRICT.

7. KUNHI AMMA, D/O.KUNHUKUTTY AMMA, THOTTARA VELUTHEDATH, COIMBATORE, TAMIL NADU.

8. MALU AMMA, ...DO.....DO.....

9. N.GOVINDAN NAIR, SON OF THOTTARA VELUTHEDATH NARAYANAN NAIR, TANJORE, TAMIL NADU.

10. KOLLANGATTU KESAVAN NAIR, KOTTAKKAL AMSOM AND DESOM, ERNAD TALUK, MALAPPURAM DISTRICT.

11. VISWANATHAN, SON OF KOLLANGATTU AMMUNNI AMMA, KOTTAKKAL AMSOM AND DESOM, ERNAD TAU;K, MALAPPURAM DISTRICT.

12. MULANHIPILAN KUNHIMOHAMMED, SON OF KUNHUNNEEN, KOTTAKKAL AMSOM AND DESOM, ERNAD TALUK, MALAPPURAM DISTRICT.

13. ARANGATT JANAKI AMMA, WIFE OF THOTTARA VELUTHEDATH RAVUNNIKUTTY NAIR, KOTTAKKAL AMSOM AND DESOM, ERNAD TALUK, MALAPPURAM DISTRICT.

14. THENNASSERI PARAMBIL DAMODARAN, SON OF KELU, KOTTAKKAL AMSOM AND DESOM, ERNAD TALUK, MALAPPURAM DISTRICT.

...3/-

15. MANDAYAPURATH KUNHIMOHAMMED, SON OF KUNHAHAMMED, KOTTAKKAL AMSOM AND DESOM, ERNAD TALUK, MALAPPURAM DISTRICT.

16. SANTHAKUMARI, D/O.LATE KUTTAN NAIR, KALLANGAD HOUSE, AMBALAVATTOM, KLARI AMSOM AND DESOM, P.O.EDARIKODE, MALAPPURAM DISTRICT.

17. PRABHAVATHI, D/O.....DO.....DO.....

18. INDIDRA, D/O.....DO.....DO.....

19. VASANTHA, D/O.....DO.....DO.....
(WRONGLY SHOWN AS VALSALA IN THE APPELLATE JUDGMENT)

20. JAYAN, S/O.....DO.....DO.....

21. LATHA, D/O.....DO.....DO.....

22. LAKSHMIKUTTY AMMA, W/O.....DO.....DO.....

* THE NAME OF R1 DELETED FROM THE PARTY ARRAY AND R16 TO R22 ARE ADDED AS PER ORDER IN C.M.P.1351/1994 DTD. 24/08/94.

BY ADV. SRI N GOVINDAN NAIR for -R10
SRI K K MOHAMMED RAVUF- for R15
SRI.SAJAN VARGHESE for R15
SRI. PARAMESWARAN NAIR)
SRI.THOMAS JOSEPH) for R10

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 06/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO.429 OF 1993

Dated 6th June 2007

J U D G M E N T

Plaintiffs in O.S.464 of 1974 on the file of Munsiff court, Parappanangadi are appellants. Respondents are defendants. Appellants instituted the suit seeking a decree for partition and separation of plaint schedule property contending that plaint schedule property was obtained by Govindan Nair, Narayanan Nair, Meekakshi Amma and Kunjukutty Amma from Kizhakke Kovilakam in 1914 as per kanam charth and on the death of Govindan Nair his rights devolved on plaintiffs 1 to 6 and on the death of Meenakshi Ammma her rights devolved on defendants 1 to 6 and on the death of Kunjukutty Amma her rights devolved on defendants 7 to 9 and on the death of Narayanan Nair his rights devolved on 10th defendant and plaint schedule property is in the joint possession and enjoyment of plaintiffs and defendants 1 to 10 and that are to be divided and plaintiffs are entitled to get 1/4th share. Defendants 11 to 16 were subsequently impleaded contending that on the contentions raised by

defendants they are necessary parties. First defendant filed a written statement admitting that the property originally belonged to Narayanan Nair, Govindan Nair, Meenakshi Amma and Kunjukutty Amma as per 1914 document. It was contended that Narayanan Nair died in 1945 and Govindan Nair had laid up due to paralytic stroke and Kunjukutty Amma had no male children and only Meenakshi Amma had first defendant as male child. When the rent had fallen in arrears and it was found that unnecessarily rent is to be paid to Kovilakam and nobody is there to look after the property, Meenakshi Amma with the consent of others granted a lease in favour of her son the first defendant with a stipulation to pay contract rent of 100 paras of paddy and put first defendant in possession of the property and since then he has been in possession of the property as a tenant and therefore property is not available for partition. It was also contended that subsequently property was assigned by first defendant and even if plaintiffs have any right, it is lost by adverse possession and limitation.

2. 4th defendant filed a written statement supporting plaintiffs. Defendants 5 and 6 filed written statement contending that first defendant with an intention to defeat the right of other sharers executed

fraudulent documents and it is known that first defendant executed a document in favour of Kesavan Nair and Kesavan Nair assigned the property to 12th defendant Viswanathan who assigned it in turn to 13th defendant Kunjimuhammad and first defendant had no right to alienate the property and the transfers are not binding on the property or defendants. Defendants 7 to 10 filed a similar written statement. After additional defendants were impleaded 11th defendant filed a written statement re-iterating the contentions raised by first defendant and contending that he had assigned his right in favour of 12th defendant. 15th defendant filed written statement contending that he had purchased the rights of defendants 7 to 10 as per document No.1872/77 and he had also obtained an order from Land Tribunal and half of the plaint schedule property is in exclusive possession. 16th defendant filed written statement contending that a portion of item No.2 of plaint schedule property was set apart to the share of 12th defendant as per document No.1838/74 and subsequently it was assigned by 12th defendant in favour of 13th defendant as per document No.2304/74 who in turn assigned it in favour of 16th defendant as per document No.891/82. It was contended that even if courts find that properties are available for partition, that property is to be set apart

to the share of 12th defendant.

3. Learned Munsiff framed necessary issues. As the question of tenancy was raised by defendants 1 and 11 learned Munsiff referred that question to Land Tribunal under Section 125(3) of Kerala Land Reforms Act. Land Tribunal, Malappuram took the referred case as O.A.18 of 1980. When that case was taken up for evidence, plaintiffs failed to appear. Land Tribunal after recording the evidence of Rws.1 and 2 and marking Ext.R1 rendered a finding that tenancy claimed by first defendant was proved and therefore he has tenancy right over the property till it was transfered in 1969. After findings of the Land Tribunal were received by the trial court plaintiff remained absent and suit was dismissed for default. The suit was ultimately restored by the appellate court, in an appeal filed by plaintiff challenging the dismissal of the restoration application. Thereafter learned Munsiff examined second plaintiff and defendants 1 and 16 as Dws.1 and 2 and marked Exts.A1 to A3 and Exts.B1 and B2. Learned Munsiff accepted the findings of Land Tribunal. In view of that findings other issues were not answered and the suit was dismissed with cost. Plaintiffs challenged the decree and judgment before Sub court, Tirur in A.S.48 of 1985. Learned Sub Judge on re-appreciation of evidence found

that plaintiffs did not contest the case before Land Tribunal and held that findings of Land Tribunal is binding on them. Upholding that finding first appeal was dismissed. It is challenged in the second appeal.

4. Second appeal was admitted formulating the following substantial questions of law.

1) Whether an oral lease can be sustained without acceptable and believable evidence and whether courts below and Land Tribunal are justified in not considering the inherent improbabilities of the oral lease set up in the suit?

2) Whether courts below and Land Tribunal were justified in ignoring the legal principles relating to oral lease alleged by a co-owner of the property from another co-owner and upholding the lease so as to bind the entire sharers?

3) Whether on the evidence and circumstances of the case, courts below were justified in upholding the lease set up by contesting defendants and dismissing the suit for partition.

5. Learned counsel appearing for appellants and respondents were heard.

6. Learned counsel appearing for appellants argued that as per written statement contesting defendants are set up a lease from the name of mother of first defendant to her son and though it was pleaded in written statement that it was with the consent of all other co-owners oral

lease was granted when first defendant was examined before Land Tribunal his case was that lease was granted by Govindan Nair and his mother Madhavikutty Amma and not that lease was granted the mother for all co-owners with the consent of all other co-owners and this was not considered either by Land Tribunal or first appellate court. It was pointed out that first appellate court did not independently consider the claim for tenancy and only considered whether plaintiffs were justified in not contesting the case before the Land Tribunal and holding that they did not file application before Land Tribunal to set aside the finding which was rendered ex-parte learned Sub Judge upheld the findings of the Land Tribunal. It was argued that first appellate court disposed the appeal even without getting the entire records from Land Tribunal including the oral evidence recorded and Ext.R1 relied on by Land Tribunal and in such circumstance, findings are to be set aside.

7. Learned counsel appearing for contesting respondents argued that when second appellant was examined before the trial court it was admitted by her that first defendant has been in possession of the property and was paying rent to Kovilakam and obtained receipts and no share of profit was given to the co-owners and in such

circumstance, there is no reason to interfere with the findings of Land Tribunal.

8. On going through the records of the trial court and first appellate court, it is clear that the entire records including exhibits marked and deposition of witnesses examined before the Land Tribunal, were not forwarded from the Land Tribunal to Munsiff court and was not available to the first appellate court to consider while disposing the appeal. Even though as provided under Section 125(5) of Kerala Land Reforms Act, findings of Land Tribunal is only binding on the trial court. It is not binding on first appellate court. First appellate court is bound to consider the correctness of the finding of Land Tribunal in the regular first appeal. First appellate court can confirm, modify or set aside the findings of Land Tribunal. Correctness of the findings of Land Tribunal should have been independently considered by the first appellate court. Without getting records from Land Tribunal especially when plaintiffs did not contest the case before Land Tribunal and RW1 was examined and Ext.R1 was marked the first appeal should not have been disposed. Whether there was sufficient cause for plaintiffs not to appear before Land Tribunal is not a very relevant fact to be considered while considering the

correctness of findings of the Land Tribunal. For the failure of appellants to contest the case also, if evidence on record do not establish the tenancy, the plea cannot be upheld by first appellate court and it cannot affix its stamp of approval over that finding. First appellate court is bound to consider the correctness of the findings of the Land Tribunal. To decide that correctness it is mandatory that records which were relied on by Land Tribunal, should be considered by first appellate court. As it was not done, it is necessary to set aside the judgment of first appellate court and to remand first appeal back to first appellate court. It is more so, because in this case tenancy was claimed by first defendant from his mother, though with the consent of her brother contending that one brother died in 1945 and other brother was laid up due to paralytic stroke and sister of mother does not have male children and therefore to avoid burdening the property by keeping rent in arrears, a lease was created by the mother in favour of son. Though it was contended in written statement that oral lease was granted with the consent of all others, what was stated by Land Tribunal in the findings was that evidence of first defendant was that lease was granted by Govindan Nair and mother of first defendant as against contentions raised in

the written statement. In the light of this discrepancy first appellate court should have verified the evidence on record before upholding the findings of Land Tribunal.

9. Appeal is allowed. Judgment of first appellate court is set aside. A.S.48 of 1985 is restored to file and remanded back to Sub court, Tirur for fresh disposal in accordance with law. First appellate court is to get the records from Land Tribunal and dispose first appeal on merit. It is made clear that if records of first appellate court is not forthcoming and first appellate court is not in a position to get records from Land Tribunal first appellate court has to dispose the appeal even without said records after hearing the counsel on merit, on the records available including copies of missing records. It is also made clear that if it is found that tenancy claimed is not sustainable, the claim for adverse possession raised by defendants is to be considered and finding is to be arrived at.

Send back the records immediately. Parties are directed to appear before Sub court, Tirur on 26/7/2007.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

==========

M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.429 OF 1993

6th June 2007

==========